United Nations AT/DEC/1215

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1215

Case No. 1305: NGWINGTE Against: The Secretary-General of the International Maritime Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Ms. Brigitte Stern, Vice-President, presiding; Mr. Omer Yousif Bireedo; Ms. Jacqueline R. Scott;

Whereas, on 19 August 2002 and on 21 May 2003, Mary Mba Ngwingte, a staff member of the International Maritime Organization (hereinafter IMO), filed Applications that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 23 June 2003, the Applicant, after making the necessary corrections, again filed an Application requesting the Tribunal, inter alia:

> "1. *To rule* that the refusal by the Respondent to recognize the Applicant's injury as work-related, without seeking the advice of the Advisory Board on Compensation Claims (ABCC), was a violation of IMO staff rule 106.3 and that the refusal denied to the Applicant the benefit of the procedure in Appendix D to the [IMO] Staff Rules ...
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> 2. *To rule* that the decision of the Respondent not to recognize the Applicant's injury as work-related was therefore null and void;
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> 3. *To order the Respondent* to establish the ABCC as required by article 16 of Appendix D to the [IMO] Staff Rules, subject to any necessary adjustments to its membership in the interest of impartiality and practicality, and to seek its advice on the claims of the Applicant before taking a new decision;
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> 4. *To order the Respondent* to pay to the Applicant the sum of 10,000.00 [pounds] sterling to compensate her for the trouble to which she has been put in

> seeking to have her claim for compensation under Appendix D examined and for the delay which is due in large part to the failure of the Administration to follow its own rules and, in particular, to the fact that the Head of the Personnel Section (later Deputy Director, Human Resources,) misled the [Joint Appeals Board (JAB)] ...
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> 5. *To order the Respondent* to make an award to the Applicant in respect of her claim for the payment of compensation equivalent to two years' net base salary 'on the basis of the physical pain and mental suffering [of the Applicant] as well as IMO's negligence' ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 5 January 2004 and twice thereafter until 30 April 2004;

Whereas the Respondent filed his Answer on 15 April 2004;

Whereas the Applicant filed Written Observations on 3 September 2004, and the Respondent commented thereon on 30 September;

Whereas the Applicant filed additional Written Observations on 4 October 2004, and, on 19 October, the Respondent responded thereto;

Whereas, on 28 October 2004, the Applicant submitted further comments;

Whereas the facts in the case are as follows:

The Applicant entered the service of IMO as a Principal Clerk-Secretary in the Personnel Services Unit, Personnel Section (now called Human Resources Services), in the Administrative Division, at the G-6, step V level, on 1 September 1995. She was promoted to Senior Administrative Assistant, at the G-7, step V level, on 1 March 1997.

By June or July 1998, the Applicant began to experience pain in her shoulder and right wrist which was diagnosed by her general practitioner as repetitive strain injury (RSI) or work-related upper limb disorder (WRULD). The general practitioner recommended that her workstation be changed. The Applicant related this information to the IMO Medical Adviser's Office.

On 17 March 2000, the Head, Personnel Policy and Services Unit (subsequently Head, Personnel Section), informed the Head, Information Technology Section, by memorandum that "one of the levers" of the printer used by the Applicant for printing the forms was broken and that it was "urgent" that the machine be repaired or replaced because "quite a large number of Personnel Action forms are prepared each month".

On 17 April 2000, the Staff Nurse advised the Applicant that a new printer was being ordered and that it would arrive shortly. She also advised her that the IMO

Medical Adviser "would like to see [her] again within the next 2-3 weeks to review [her] situation". On 7 July, the Staff Nurse wrote to the Head, IT and Information Systems, requesting an update on the replacement printer and stating that the Applicant was continuing to "have problems directly resulting from her current defective printer". She added that "any work-related injury or illness [was] a serious matter of concern and should be treated with the [utmost] urgency". On 27 July 2000, the IMO Medical Adviser advised the Head, Personnel Section, that he had seen the Applicant, who continued to have wrist problems; that he had advised her to see her own general practitioner; that she should refrain from work for a minimum of two weeks; and, that she should not resume work without medical clearance.

On 14 August 2000, the IMO Medical Adviser reported to the Head, Personnel Section, that he had "reviewed" the Applicant and that "her condition ha[d] improved and she [could] now return to work in a limited capacity". He recommended that she not use the defective printer. On 15 August 2000, the Applicant wrote to the Head, Personnel Section, stating that she had been away on sick leave for a period of two weeks. She requested that her sick leave not be counted against her normal sick leave entitlement and that expenses from medical treatment be covered by the Respondent, because her sick leave arose from RSI originating from the performance of her work duties.

On 21 August 2000, the Head, Personnel Section, was advised by a Personnel Officer that the IMO Medical Adviser, when consulted, had expressed the view that the Applicant's wrist-injury was a result of RSI and therefore work-related. The Personnel Officer also reported that the Director, Administrative Division, "did not accept the injury as work-related" and that the Applicant's immediate supervisor was of the view that "it was a difficult case to prove that the injury was a result of work".

On 30 August 2000 a new printer was installed.

On 28 September 2000, the Head, Personnel Section, advised the Applicant that "IMO does not accept an injury of an upper limb disorder as being service-incurred" and that, in view of the small percentage of her time spent on actually printing Personnel Action forms, IMO could not agree with the assessment that it was the broken printer which caused her injury. However, IMO did offer, as an exceptional measure, to refund the portion of medical expenses not covered by medical insurance. The record does not show any reply from the Applicant to this offer of financial assistance.

On 3 November 2000, the Applicant wrote to the IMO Secretary-General requesting review of the decision not to recognize her condition as work-related for purposes of sick leave and payment of medical expenses. On 1 December, the Applicant was advised that new medical information she had provided would be assessed and that the Secretary-General would review her case and inform her of the outcome in due course.

On 27 February 2001, the Applicant wrote to the Chairman of the IMO JAB, requesting that a JAB be convened to consider her case. The Applicant's request was granted, and the JAB was established on 8 October 2001. On 20 November 2001, the Applicant submitted "clarifications" to the JAB, adding a request for two years' compensation and, in the event that she cease work by reason of disability, payment of salary and allowances until her return to work.

On 27 January 2003, the Head, Personnel Section, wrote to the Chairman of the JAB, stating that

> "in the event that, ... the JAB finds that the injury was in fact 'attributable to the performance of official duties' the compensation issues must be left, under the provisions of article 11 of Appendix D of the Staff Regulations, to an [ABCC]. In this case, issues relating to compensation do not fall under the competency of the JAB whose task should be 'limited to the consideration of the issue whether the injury was work-related'."

The JAB adopted its report on 28 February 2003. Its considerations and recommendations read, in part, as follows:

> "**Consideration** ...
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> 2.1 ... [T]he Board ... agreed as follows:
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> 1. The condition RSI ... or WRULD ... is a recognized medical condition in the U.K. It has certain diagnostic criteria which can only be established by a Consultant Rheumatologist or Occupational Health expert with experience in this disorder.
>
> 2. The statement of [the Head, Personnel Section,] ... is very difficult to comprehend. Where did he receive the authority to comment on a medical disorder in the terms *"I would like to inform you that IMO does not accept an injury of an upper limb disorder as being service-incurred"?*
>
> 2.2 The Board feels however that the medical evidence available on the case is sparse.
>
> ...
>
> 2.3 It does seem to the Board after studying all the documentation that in spite of being warned on 7 June 2000 by the Staff Nurse ... that 'any work-

related injury is a serious matter of concern and should be treated with the [utmost] urgency and prompt attention', IMO did delay unnecessarily the replacement of her printer/work layout and unduly delayed answering her numerous memos and requests.

2.4 As for the Appellant's claim under Appendix D to the Staff Rules and Regulations submitted on 20 November 2001, i.e. 9 months after she filed her appeal, it is a matter which goes beyond the terms of reference of the JAB.

3 Recommendations

3.1 The Board would recommend a full medical report to be obtained from an independent rheumatology or occupational health expert who has the benefit of studying all of the Appellant's previous medical history, including her [general practitioner's] records, and can make an informed diagnosis.

3.2 In addition the Board would recommend that:

1. IMO should act much more quickly and also more sympathetically in any future similar cases; and,

2. Members of staff should not make medical comments or refute diagnosis when they obviously have no expertise."

On 11 March 2003, the Secretary-General, IMO, transmitted a copy of the report to the Applicant and informed her that he had noted the conclusion of the JAB and accepted its recommendations as set out in paragraphs 3.1 and 3.2, and that she would be contacted shortly with regard to recommendation 3.1.

On 4 April 2003, the Applicant was advised that an appointment had been set up for her to see the IMO Medical Adviser. On 9 April, however, the Applicant indicated that the appointment with the IMO Medical Adviser would not be in accordance with the JAB recommendation since that Board had said the medical report should be obtained from an "independent" health expert. Subsequently, the IMO Medical Adviser organized an appointment for the Applicant with an independent specialist. Following the Applicant's visit to the independent specialist, a report dated 6 June was received by the IMO Medical Unit, which advised the Administration, on 28 July, that the Applicant refused to authorize the release of the contents of the report to the JAB.

On 23 June 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The terms of reference of the ABCC include consideration of the question of principle as to whether medical condition is service-incurred. No decision

on that matter can lawfully be taken by the Respondent until and unless he has previously received the advice of an ABCC.

2. The only way to restore the legality of the situation is for the Respondent to establish the ABCC in accordance with Appendix D to the Staff Regulations and Rules of IMO and to seek its advice before taking a new decision.

3. The Applicant believes that the claim for compensation on the grounds of IMO's failure to follow its own rules, especially the misdirection of the JAB by the Head, Personnel Section, and the claim for compensation for physical pain and mental suffering are self-explanatory.

Whereas the Respondent's principal contentions are:

1. The Applicant's petition is premature in light of the fact that the Secretary-General has accepted the recommendation of the JAB and the Applicant has not formally presented a claim for compensation supported by medical evidence, including the results of the examination.

2. The appeal was properly considered by the JAB and the Head, Personnel Section, properly requested the JAB to limit its consideration to the issue of whether the injury was service-incurred.

3. The Respondent's request that the Applicant undergo a medical examination by an occupational health specialist did not violate her rights.

4. The Respondent is not obligated to establish an ABCC until and unless the Applicant produces the report from the occupational health specialist to him.

5. The Applicant herself was partly responsible for the delays by not providing the documentation to allow further consideration of her original claim and these delays did not cause any additional injury.

The Tribunal, having deliberated from 3 to 24 November 2004, now pronounces the following Judgement:

I. The Applicant challenges the refusal of the IMO Administration to treat her RSI as an injury attributable to the performance of duties pursuant to Appendix D, as in effect under the Staff Regulations and Rules of the United Nations, as adopted by the IMO. Specifically, the Applicant challenges the authority of the Administration to make that decision without first seeking the advice of the ABCC, claiming a violation of IMO staff rule 106.3. The Applicant requests the Tribunal to find null and void the decision that her injury is not service-incurred, and further requests that the Tribunal

order the establishment of an ABCC pursuant to article 16 of Appendix D. The Applicant seeks compensation for delay in addressing her claim and for her physical pain and suffering and for the IMO's alleged negligence.

IMO staff rule 106.3 provides:

> "Staff members shall be entitled to compensation in the event of death, injury or illness attributable to the performance of official duties on behalf of IMO, in accordance with the rules laid down in appendix D to the Staff Rules of the United Nations. The text of appendix D to the Staff Rules of the United Nations is given in appendix D to these Rules. In the case of staff members in the General Service category, appropriate adjustments in the minimum amounts of compensation may be made by the Secretary-General taking into account the proportion which such staff members' salaries bear to the base salary of grade P.1."

II. On 15 August 2000, by letter to the Head, Personnel Section, the Applicant notified the Administration that she was out on sick leave arising from an RSI. As a result, the Applicant requested that her injury be recognized as service-incurred, that her time off on sick leave not be counted against her normal sick leave entitlement and that IMO bear the expenses of her medical treatment. In response, the Head, Personnel Section, unilaterally (*i.e.*, without any input from the ABCC) made a determination that the Applicant's RSI was not service-incurred. In his letter to the Applicant, dated 28 September 2000, the Head, Personnel Section, informed the Applicant not simply that her injury was not service-incurred, but that "IMO does not accept an injury of an upper limb disorder as being service-incurred". Notwithstanding his denial of service-incurred status, however, the Head, Personnel Section, offered to settle the matter by refunding to the Applicant the percentage of medical expenses not reimbursed by her medical insurance. The Applicant, however, did not accept the Administration's offer of settlement and, by memorandum of 3 November 2000, appealed the decision to the Secretary-General of the IMO. After several months without a response from the Secretary-General of the IMO, on 27 February 2001 the Applicant requested the Administration to convene a JAB to consider her case. Two years later, the JAB issued its opinion, on 28 February 2003.

III. In reaching a decision that was largely favourable to the Applicant, the JAB criticized both the delay and lack of compassion with which the IMO Administration had acted in this matter. In addition, the JAB was dismayed at the unilateral decision of the Head, Personnel Section, that the Applicant's injury was not service-incurred.

The JAB was particularly surprised by the specific language used by the Head, Personnel Section, in denying service-incurred status, noting:

> "The statement of [the Head, Personnel Section,] in his letter of 28/9/2000 is very difficult to comprehend. Where did he receive the authority to comment on a medical disorder in the terms *'I would like to inform you that IMO does not accept an injury of an upper limb disorder as being service-incurred'*?"

Although the JAB refused to decide the issue of service-incurred injury, on the basis that such a decision went beyond the terms of reference of the JAB, the JAB did conclude that the medical evidence presented in the case was sparse. The JAB recommended that the Applicant obtain a full medical report by a qualified health expert, who could make an informed diagnosis of her injury. The Applicant submitted her case to the Tribunal on 23 June 2003.

IV. The Tribunal first addresses the threshold question of whether the IMO Administration had authority, as it asserts, to determine, without the advice of the ABCC, whether the Applicant's RSI was "attributable to the performance of duties" under Appendix D. According to the IMO Administration, historically, it has made the initial determination of whether a staff member's injury is service-incurred, and it requests the advice of the ABCC only in two instances. First, when the Administration determines that an injury is attributable to the performance of duties, it refers the case to the ABCC in order for the ABCC to determine the level of compensation to which the staff member is entitled by virtue of the service-incurred injury. Second, the Administration refers a matter to the ABCC when it determines that the injury is not service-incurred, and the staff member disputes the determination. In the latter case, the ABCC acts as an appellate body to adjudicate the dispute. The IMO Administration considers this use of the ABCC to be "consistent with the wording and spirit of Appendix D to the Staff Rules" and asserts that "this approach has not had any adverse effect on the ... legitimate interests of staff members".

V. In the instant case, the IMO Administration exercised its believed authority to deny the Applicant service-incurred injury status. Thereafter, the Administration did not advise the Applicant to bring her claim to the ABCC, but instead she appealed to the JAB.

VI. The Tribunal finds that the IMO Administration's interpretation of Appendix D and the function and role of the ABCC in matters involving service-incurred injuries is

misguided, and the Tribunal is surprised that the Administration would find such interpretation "consistent with the wording and spirit of Appendix D", as it contravenes the manner in which the United Nations currently implements and historically has implemented Appendix D.

VII. The Tribunal notes that Appendix D is designed to compensate staff members for injuries occurring in the performance of their duties. It calls for the establishment of an ABCC to make recommendations to the Secretary-General "concerning claims for compensation under [Appendix D]". Although Appendix D, on its face, is unclear as to who makes the initial determination as to service-incurred status, the long-standing practice of the United Nations has been that the Secretary-General is the one who makes the determination, *based on the recommendations* of the ABCC. This is clearly set out in Information Circular ST/ADM/SER.A/564 dated 30 September 1959.

VIII. The Tribunal can well understand the requirement that the ABCC make recommendations, based upon which the Secretary-General can then determine such service-incurred status. First, the ABCC is expert on matters involving compensation claims, including whether and to what extent injuries are service-incurred. Second, and perhaps more importantly, the ABCC has authority to convene a medical board to assist the ABCC in reaching a determination regarding service-incurred status, if necessary. The IMO Administration, on the other hand, lacks both the expertise of the ABCC and the ability to convene a medical board, if needed. Moreover, given the sensitive and personal nature of staff members' medical conditions and treatments, the Tribunal finds such matters to be more appropriately reviewed by the ABCC. Thus, the Tribunal finds that the Administration erred in unilaterally denying service-incurred status to the Applicant and that this decision is therefore null and void and of no effect, having been taken without proper authority or competence.

IX. The IMO Administration's failure in this respect, however, is more than just a simple misunderstanding of the appropriate application of Appendix D and the role of the ABCC. While the Tribunal does not ascribe malicious intent to the Administration in the erroneous application of Appendix D, the Tribunal notes that the Administration even failed to apply Appendix D according to its own stated interpretation. Although the Administration asserts in its Answer that one of the circumstances in which it submits the issue of service-incurred status to the ABCC is when a denial of such status has been made by the Administration and the Applicant disputes the

determination, no submission occurred in this case. When the Head, Personnel Section, determined that the Applicant's injury was not service-incurred and the Applicant disputed that conclusion, the Administration, according to its admitted but erroneous interpretation of Appendix D, should have then referred the matter to the ABCC. It did not. Instead, the Applicant was referred to the JAB, which clearly had no authority to determine whether the injury was service-incurred.

X. In defence of its failure to refer the matter to the ABCC, the Administration asserts that it had no idea the Applicant was making a claim for compensation under Appendix D that would have required referral to the ABCC, because the Applicant never made a claim for compensation. In this regard the IMO Administration states that "the Administration was not aware that [the Applicant] intended to make a claim under Appendix D. Therefore the Administration could not have 'advised her on procedures' as suggested." The Tribunal is more than a bit surprised by this admission. Although the Tribunal notes that the Applicant did not use the words "compensation" or "claim" or request a fixed sum of money in her initial memorandum to the Administration, dated 15 August 2000, it is clear that the Applicant was requesting compensation in the form of reclassification of sick leave time for, and payment of, medical expenses attributable to, what she believed was a service-incurred injury. Again, the Administration's assertions in this regard indicate either disingenuousness or a lack of competence.

XI. Further, the Administration's claim that the Applicant failed to file the appropriate form in order to claim an Appendix D benefit is also unfounded. In a memorandum to staff members, dated 3 April 1990, the Director, Administrative Services, set forth the procedures for reporting of injuries arising from work-related accidents. In that memorandum, the staff members were directed to report the injury to the Staff Nurse verbally, followed by a written report to the Head, Personnel Section. Thereafter, "reports [would] be assessed with a view to determining whether or not such injuries fall under the applicable provisions of Appendix D to the Staff Rules". The Applicant followed this directive in all respects. Moreover, even if the Applicant had filed a form to the ABCC, the Administration, based upon its flawed interpretation of Appendix D, would have considered that filing violative of its perceived authority to make the initial determination of service-incurred status. The Applicant should not be penalized in this respect.

XII. The Tribunal is also more than a little concerned by the sweeping statement made by the Head, Personnel Section, denying the Applicant's claim for service-incurred status. The Tribunal is at a loss to understand how an individual, not a member of the ABCC and with no apparent medical expertise, could so broadly ordain that upper limb disorders could never be service-incurred. What is an "upper limb disorder"? Did he mean that if a filing cabinet had fallen on to the Applicant and dislocated her shoulder or smashed her elbow, this would never be considered a service-incurred injury? Obviously, the Administration, through its Head, Personnel Section, wildly overstepped its bounds and mischaracterized the IMO's position on service-incurred injuries. Aside from violating the Applicant's rights to have her injury reviewed by a competent body, this inappropriate statement undermined the authority of the Administration. Thus, the Tribunal would recommend that, in the future, the IMO Administration follow the correct application of Appendix D.

XIII. Since the Tribunal finds that the issue of whether the Applicant's injury was service-incurred should have first been reviewed by the ABCC before the Secretary-General of IMO made his decision, and that the failure of the Administration to follow the appropriate procedure was a violation of the Applicant's rights to be heard by the ABCC, the Tribunal finds that the matter should be reviewed now by the ABCC, so that the ABCC can make recommendations to the Secretary-General regarding whether the Applicant's injury is service-incurred and if so, whether the Applicant is entitled to any compensation resulting therefrom.

XIV. The Tribunal now turns to the issue of delay. As the JAB found, the "IMO did delay unnecessarily the replacement of [the Applicant's] printer/work layout and unduly delayed answering her numerous memos and requests". Accordingly, the JAB recommended that "IMO should act much more quickly ... in any future cases". The Tribunal concurs with the JAB's findings and recommendations and finds that, because the Applicant suffered undue delay at the hands of the IMO Administration, in the pursuit of her claim, she is entitled to be compensated.

XV. Therefore, in consideration of the foregoing, the Tribunal:

I. Orders the Respondent to establish an ABCC under article 16(a) of Appendix D to the IMO Staff Rules for prompt review of the Applicant's request to treat her RSI as service-incurred and to make

recommendations to the Secretary-General as to whether her injury was service-incurred;

2. Orders the Administration to pay to the Applicant the sum of $10,000 for violation of her right as a staff member to have the determination of whether her RSI was service-incurred be determined by the Secretary-General based upon recommendations by the ABCC and for the delay related thereto; and,

3. Rejects all other pleas.

(*Signatures*)

Brigitte **Stern**
Vice-President, presiding

Omer Yousif **Bireedo**
Member

Jacqueline R. **Scott**
Member

New York, 24 November 2004

Maritza **Struyvenberg**
Executive Secretary